No. 10,360

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MILWAUKEE MECHANICS' INSURANCE COMPANY (a corporation),
Appellant,

vs.

SILVO QUESTA and JENNIE QUESTA (husband and wife),
Appellees.

BRIEF FOR APPELLEES.

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STATEMENT OF CASE.

A. The pleadings—Correctly stated by appellant.

B. The evidence—It is not fully stated by appellant.

The facts fully stated are:

On August first nineteen hundred and forty one Silvo Questa applied to Frank Hassett, agent for the Milwaukee Mechanics' Insurance Co., for $7500.00 insurance on a barn situated on the Glendale Ranch, Washoe County, Nevada, for a period of three years in the usual form with the usual policy which he made on other properties of Questa and his wife: (1) Hassett assured Questa that he would insure the barn and that he would come down to the ranch to see the barn;

(2) Mr. Hassett went to the ranch. The barn is about one hundred yards from the house and it is a big barn; you couldn't help but see it. That barn was the biggest building at the ranch; (3) Questa spoke to Hassett at least twice thereafter concerning the insurance and Hassett said: "I will take care of it and I will come down:" (4) On September 20th, the barn burned down (5) and Questa called on Hassett four days after because he expected Hassett to show up at the ranch (6) Questa asked Hassett if he had his policy of insurance after he told him that the barn had burned down. Hassett replied to Questa not to worry that it was his worry from then on and at the same time put his hand to his head and said: "It is all my fault. Let me do the worrying. I have been so busy running back and forth to Las Vegas, Nevada." Thereafter he continued to do business with Hassett. (7) After New Years 1942 Hassett informed Questa that he had talked to his boss and his boss said that there was no insurance. (8) Hassett told Questa to be patient for three days and the last part of January, Hassett told Questa that he had told his company to charge it up to advertisement and pay it (9) and Hassett stated in twenty five years he had been with the company he had learned something, that hereafter when he got an order he would write it down. He also said it was an order and if he had to get up on the witness stand he would admit it was an order. (10) Questa stated that he had been in the ranching business all of his life (11) and was familiar with barns and that he valued the barn at fifteen thousand dollars and he stated it would cost fifteen thousand dollars to

replace the barn. (12) That the fabric of the structure pertaining to uprights and timbers and girders and other things that made for the construction were timbers 12 x 12 and 10 x 10 ironed and braced under each and every pillar. (13) The picture of the barn was admitted in evidence as plaintiff's Ex. A which was taken during the summer of 1940. A policy similar to the other policies received by Questa was admitted in evidence as plaintiff's Ex. C (14) after Questa had testified that it was similar. A check was admitted in evidence marked plaintiff's Ex. D in the sum of $75.00 made payable to Frank Hassett agent for defendant in the sum of $75.00 and dated August 15, 1941. (15) Mr. S. L. Williams testified that he had been a building contractor for 32 years and built homes and large buildings naming them. (16) That he worked at the Glendale Ranch of Questa's and five five years before he rebuilt a stone house on the ranch. (17) Mr. Williams testified that a building of the kind of timbers in the barn with new piers put under them the piers being one and one half feet thick and five feet square would be thought to restore to be as good as any barn. (18) Mr. Williams testified that it would cost $14,325.30 to reconstruct the barn. (19) He further testified that he would deduct $3625.99 from that figure for the floors and stalls which had been removed before the fire in order to place concrete piers under posts. (20) Mr. Hassett testified that he went to the ranch and told Mrs. Questa at the ranch that he had come there to talk to Silvo about the insurance on the barn, on July 25 or 26 1940 and he said Mrs. Questa said: "Silvo takes care of that so you will have to

see him." However Mr. Hassett went to the ranch about insurance on the barn and the barn was the largest building on the ranch. Mr. Hassett testified he had insured against fire on the ranch and collected premiums for same company. (21) Mr. Hassett was asked by his attorney if at any time prior to the fire was any amount mentioned between you and Mr. Questa as to the amount of insurance that was to be carried on the barn and Mr. Hassett said no and when asked about rate also Hassett answered (22) "No, he never inquired the rate, in fact he never asked me the rate for anything, just placed the insurance and we wrote the policy." Mr. Hassett was asked by his attorney: "Did you at any time, prior to the fire, write out any covering note or memorandum of insurance with regard to this barn?" and Hassett answered: "No, I did not," but since that time and after getting better acquainted with the way the people talk, I think I should have made a mental memorandum.

Mr. Levit: "For how much insurance?" (22)

"Well, I think, in other words I think if I got out there deliberately to write the insurance, I would have written another two thousand dollars." (24)

The Court said at that juncture: "Just a moment. I didn't exactly understand one expression of the witness. I would like to have you explain what you meant by mental memorandum."

A. "Well, after growing better acquainted with Silvo as time went on, I think what Silvo meant for me to do the first time I met him was to go out and

see the barn and whatever I thought was right for it I could write on it without further conversation with him, and I didn't, unfortunately understand his language at that time." (25)

In appellant's statement on page 3 of Brief for Appellant, the testimony of Parish and Corica was that 11 days before the fire that Questa told them the barn was not insured. That testimony is entirely refuted by Questa and Ex. H of plaintiff, definitely fixes the visit of Parish and Corica during July, 1941, and not September, 1941. (26)

1- R 32
2- R 32
3- R 33
4- R 34
5- R 34
6- R 35
7- R 35
8- R 36
9- R 36
10- R 36
11- R 39
12- R 40
13- R 41
14- R 43
15- R 45
16- R 106
17- R 107
18- R 108
19- R 112-113
20- R 173
21- R 159
22- R 160
23- R 160
23- R 161
25- R 161
26- R 231-232-233-234

After the trial of the case the Court rendered judgment in favor of plaintiff for $4000.00.

SPECIFICATION OF ERRORS.

Appellant sets forth seven specifications of errors on pages 5 and 6 of his brief and he refers to them in argument I, II, III and IV of which appellee will answer hereinafter.

SUMMARY OF ARGUMENT.

Appellant sets forth on page 7 of his brief: "Appellant's argument will be presented under the following points and he sets forth four.

Appellee will answer the summary of argument hereinafter.

ARGUMENT BY APPELLEE AGAINST APPELLANT'S ARGUMENT No. I.

Appellant states: "There is a fatal variance between the contract found as the basis of recovery and the contract found as the basis of the judgment"; and he cites on page 8 of his brief 7 *C. J. S.* (contracts) Sec. 570, 1205. Appellant did not follow through with his authority, if he had he would have found in same section at page 1206: "A variance to be fatal must be substantial and material,"

Gardner v. Burket, 40 P. (2d) 279;

Johnson v. De Waard, 298 Pac. 92,

and, it has been held, must mislead the opposite party. The decisions are to the effect that the variance must mislead to render contract void.

Irby v. Phillips, 82 Pac. 931.

The adverse party not being misled to his prejudice in such a case. In 17 *C. J. S.,* Sec. 571, page 1208, sets forth:

> "But there is authority that proof of an amount due which is less than that claimed is not a variance."

In *Brazil v. Pacific Amer. Pet. Co.,* 292 Pac. 275, the contract introduced in evidence was not the one alleged and it was all together different in substance.

Nevada's Statutes With Relation to Variance Are:

Sec. 9636, N. C. L., 1929, Vol. 4. Variance. Not Prejudicial Deemed Immaterial. Amendment.

No variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, upon such terms as may be just.

Harwood v. Carter et al., 47 Nevada 335;

Martin v. Roberts, 51 Nevada 150;

Burgess v. Helm, 24 Nevada 242.

Sec. 8637, N. C. L., 1929, Vol. 4. Idem. Order, If Variance Immaterial. Amendment.

Where the variance is not material, as provided in the next preceding section, the Court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

Sec. 8638, N. C. L., 1929, Vol 4. Idem. Failure of Proof Distinguished From Variance.

Where, however, the allegation of the claim or defense to which the proof is directed is unproved, not in particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance within the last two sections, but a failure of proof.

ADDITIONAL AUTHORITIES:

17 *C. J.,* 1209, Sec. 573;

Dougherty v. Calif. Kettleman Oil Royalties, 69 P. (2d) 155.

Appellant cites 3 *C. J.* (Appeal and Error, Sec. 720) 796-7 as in appellees' favor. Appellant introduced the testimony of witness Porta (R. 177) and endeavored to show that the contract of insurance was less than $7500.00 or did not exist at all. Appellant is objecting for the first time in Appellate Court to the testimony which he elicited which cannot be done.

3 *C. J.*, 800, note 92.

Appellant's objection in the U. S. District Court should have been on the grounds of variance and should have been specific, not general, and must show in what variance consists, so that, if necessary an amendment may be made to avoid it, and another objection than that specified shall be considered on appeal.

3 *C. J.*, page 801.

APPELLEE'S ARGUMENT II
AGAINST APPELLANT'S ARGUMENT II.

Appellant states: "The judgment is not supported by the findings of fact and conclusions of law made by the Court."

Appellee cites:

Rules of Civil Procedure For the District Courts of the United States

Rule 52. Findings of the Court.

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witness."

Rule 61. Harmless Error.

No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the Court inconsistent with substantial justice. The Court at every stage of the proceedings must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties.

In view of the rules of the United States Courts the appellant should have read further in 64 *C. J.* 1247-8, which followed appellant's citation: "but except in some jurisdictions, the precision and particularity necessary in a special pleading are not necessary in a finding."

Appellant's objections set out in argument II are frivolous.

Appellant sets forth on page 13 of brief that: "In absence of a finding of fact of value of the property destroyed at the time of its destruction it is submitted that the judgment cannot stand."

Bancroft Code Pleadings, Sec. 1580, page 2614, reads:

"And an allegation that the plaintiff was damaged by the fire in a certain sum is not an allegation of value. But a failure to allege value

of the property at the time of the loss is cured by the admission of evidence as to its value without objection and by a verdict for plaintiff."

Questa testified: Page 72-73, Transcript—"I told him I wanted to insure the barn knowing he has insurance on the new house, and I told him I wanted to insure that barn and he asked me what I thought of the barn. I said, "The barn is a huge thing; it cost $15,000.00 or more to build it today."

Q. You told him that?

A. That is right, so we figured on $7500.00.

Q. When you say we figured, tell me the conversation?

A. We agreed on $7500.00.

Q. As to the amount of the policy?

A. That is right, and he was going to come down and see.

Q. See the barn?

A. That is right.

There was no objection to the foregoing.

Further testimony, page 39, Transcript:

Q. Now, Mr. Questa were you familiar with the construction of the barn?

A. Yes.

Q. Kindly describe it?

(He explained all about it on page 40.)

Q. Are you familiar with the value of the barn?

A. Yes.

Q. And what do you value the barn at?

A. Fifteen thousand dollars.

To that point there was no objection to the value.

To the following there was an objection:

> Q. Do you mean that it would cost that to replace it?
>
> A. Yes.
>
> Mr. Levit: I move the witness's answer be stricken because the replacement cost, your Honor, is not the value of the barn. The witness is not qualified to testify as to replacement cost. If your Honor feels he is qualified to testify as to value we have no objection to that, but by his testimony now he has indicated the figure of value and he has not been qualified with regard to replacement costs and therefore I move his answer be stricken as to replacement value.

A rancher has peculiar training in matters of land values and barns are affixed to the land and are real estate. A barn is the most valued adjunct to a ranch.

> *Wigmore on Evidence,* Second Edition, pages 1128-1139, on Value; Sec. 5, page 1131, On Rancher or Farmer, Vol. 1.
>
> "A sufficient qualification is usually declared to exist where the witness is a resident, landowner, or farmer in the neighborhood."

The notion is that of a person who has an interest and an opportunity to make himself acquainted with land values around him.

See also Sec. 720, Vol. 1, page 1138.

Questa had already testified that he was familiar with the construction and there was no objection and further Mr. Levit for appellant withdrew his objec-

tion if the Court felt that he was qualified to testify and the Court allowed him to testify.

In *Hegard v. California Insurance Co.,* 11 Pacific Reporter, 594:

> "Under an insurance policy that the cash value of the property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured at the time of the fire of replacing the same, and in case of depreciation of the property from use or otherwise, a suitable deduction from the cash costs of replacing same shall be made to ascertain the actual cash value."

Replacement value was testified to by S. L. Williams, pages 105, 116, 129, 133, 172-174 of Transcript.

S. L. Williams is a carpenter and contractor and is qualified to testify as to value of replacement.

Bedell v. R. Co., 44 N. Y. 370;

Wigmore on Evidence, Vol. 1 (2d ed.) pp. 1128-1139.

The usual form of insurance policy was admitted in evidence, Plaintiff's C.

Further Authorities:

Hegard v. California Ins. Co., 14 Pacific 180;

Waldron v. Home Mut. Ins. Co., 38 Pacific 136;

Emigh v. State Ins. Co., 27 Pacific 1063.

Pleading Value.

Bancroft Code Pleadings, page 2616, chapter 1580.

"And it is unnecessary to allege the actual cash value of the property although the policy

provides that the measure of recovery shall in no case be greater than its cash value at the time of the fire, since such a provision only establishes a rule as to the proof necessary to be made in order to show the loss or damage sustained, and it is not necessary to plead matters of evidence. (10)

Hegard v. California Ins. Co., 2 Cal. 663, 11 Pacific 594 (subsequent opinion in bank), 72 Cal. 535, 14 Pacific 180-359, as to the necessity for pleading matters of evidence.

Hegard v. California Ins. Co. (it is right in point). *Pacific Reporter,* page 594:

Recovery on Policy—Actual Cash Value—Findings. Where an insurance policy provides that in no case shall the recovery be greater than the actual damage or cash value of the property, a finding that the loss sustained on account of the destruction of a building by fire was a certain sum, the amount insured for is sufficient and the Court need not state the evidential fact *that the cash value of the property* when destroyed was a certain sum.

In *Hegard v. California Ins Co.,* 14 Pacific 180, Fire Insurance Policy, Depreciation Clause Evidence.

"The material question under the depreciation clause in a policy of fire insurance is, what is the actual condition and value of the property insured at the time of the fire? And, where there is no evidence for the company on that point, it is harmless error to refuse to admit

testimony as to the probable depreciation prior to the insurance of the property." In that case the provisions of the insurance policy, Plaintiff's Ex. C. relative to the mode of computing damages are the same: "The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost of the assured at that time of the fire, of replacing the same: In case of the depreciation of such property from use or otherwise as suitable deduction from the cash cost of replacing the same shall be made to ascertain the actual cash value." See page 181 of decision.

APPELLANT STATES IN ARGUMENT III:

"The findings of fact relating to the existence and terms of the oral contract of insurance are clearly erroneous." No. 1. Findings.

In answer to III appellee repeats all of the decisions heretofore set forth.

Further Authorities:

Vol. 18, *Hughes Federal Proceedings,* Secs. 24531-2-3-4-5-6, 24551. Finality and scope of review:

"Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Also sections 24571, 24572 *Hughes Federal Proceedings. R. C. L.,* Vol. 26, page 1087.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Findings must be considered as a whole and cannot be separated into parts and assailed where they cannot be successfully assailed as a whole. They are not to be construed with the strictness of special findings, but it is sufficient, if from them all taken together with the pleadings, there is enough upon a fair construction to justify the judgment, notwithstanding their want of precision.

AN OPINION OF THE COURT GIVING THE REASON FOR ITS DECISION DOES NOT OPERATE AS FINDINGS OF THE COURT.

Victor Gold Stc. Co. v. National Bank of Republic, 18 Utah 87, 55 Pacific 72.

Appellant set forth on page 14 of its brief:

2—*Nature of Proof Required to Establish an Oral Contract of Insurance.*

In answer to section 2 of Argument III concerning nature of proof an entirely different situation arises in this case where the insured has done business with the insurer in other matters of insurance. To make a binding contract for insurance there need only be the offer to insure and the acceptance.

Vol. 29, *American Jurisprudence,* page 152:

Offer to Insure and Acceptance.

"While the usual course of dealing is otherwise for an insurance contract may be initiated by the insurer offering to insure on certain terms and where this is the case the contract is

complete the acceptance of the offer by the person proposed to be insured."

Vol. 92, *A. L. R.* at 233

"The recent cases support the modern rule that if the minds of the parties have met in regard to the essential element of the agreement it does not matter whether the form of the contract is written or oral, in other words, the oral contracts of insurance are valid in the absence of charter or statutory prohibition."

Vol. 92, *A. L. R.* at 235

"In some instances it is not essential to an oral contract of insurance that every detail should be expressly agreed upon, since an implied agreement concerning essentials is as good as express agreement."

Globe and R. F. Insurance Co. v. Draper, 92 A.L.R. 235, 66 F. (2d) 985 sets forth:

"So it has been said that an agreement relative to the amount of insurance, amount of premium to be paid and the duration of the risk, need not be expressed in order to render the contract effective, but may be implied from previous dealings between the parties if such have occurred and surrounding circumstances."

Globe and R. F. Insurance Co. v. Eureka Sawmill Co. (1934), 227 Ala. 667, 151 So. 827.

Page 160, Transcript. By Mr. Levit, attorney for appellant:

"Mr. Hassett, was any amount mentioned as regards the amount of premium or rate?"

A. "No, he never inquired the rate, in fact he never asked me the rate for anything, just placed the insurance and we wrote the policy."

APPELLEE'S ANSWER TO

3. SUMMARY OF THE EVIDENCE, PAGE 15 OF APPELLANT'S BRIEF.

Appellant argues, page 15, to establish the making of the contracts appellees rely entirely upon the testimony of Questa. That is not so. The appellant's agent admits that he agreed to insure the property.

Page 157, Transcript:

Q. Was anything said on that occasion between you and Mrs. Questa as to insurance?

A. Well, she said—it seems to me I told her I come out to talk to Silvo about insurance on the barn.

Page 160, Transcript:

Q. Was any amount mentioned in regards the amount of premium or rate?

A. No, he never inquired the rate; in fact, he never asked me the rate for anything, just placed the insurance and we wrote the policy.

Page 160, Transcript:

Q. Did you at any time, prior to the fire, write out any covering note or memorandum of insurance with regard to this barn?

A. No, I did not, but since that time and after getting better acquainted with the way people talk, I think maybe I should have made a mental memorandum.

Q. For how much insurance?

A. Well, I think, in other words, I think if I got out there deliberately to write insurance, I could have written another two thousand dollars.

The Court: Just a moment. I didn't exactly understand one expression of the witness. I would like you to explain what you mean by a "mental memorandum."

A. Well, after growing better acquainted with Silvo as time went on, I think what Silvo meant for me to do the first time I met him was to go out and see the barn and whatever I thought was right for it I should write on it without any further conversation with him and I didn't unfortunately understand his language at that time.

You will note that Hassett's testimony of page 160 of transcript states: "He never asked me the rate for anything, just placed the insurance and we wrote the policy." That related to past transactions of insurance.

ANSWERING PAGE 21 OF APPELLANT'S BRIEF.

The testimony thereon was given by Corica and Parish. Parish did not go to the ranch in September as they testified but in July to insure hay purchased under contract by Mrs. Monaei L. Cupit (page 226-238 transcript), who Parish stated was always prompt in her insurance matters.

Page 213, Transcript:

Q. Is it not customary for her to attend to matters of insurance at once?

A. It is a custom. See plaintiff Ex. H.

According to the testimony Mrs. Cupit started to haul her hay at once and there was virtually none left at the time. Parish and Corica visited the ranch in September just prior to the fire. Answering page 23 of brief Appellee denied the testimony of witness Porta.

Appellant submits that the finding was erroneous.

The numerous authorities and Nevada statutes define what is a fatal variance and what is not. The judgment of the Court predicated upon his finding was his honest determination and therefore correct.

APPELLEE'S ANSWER TO PAGES 25 TO CONCLUSION OF APPELLANT'S BRIEF, BEING ARGUMENT IV OF APPELLANT.

Silvo Questa and wife are ranchers. The evidence shows that they have lived on the ranch since 1919 and Questa lived in Nevada practically all of his life. (Page 31, transcript.) As a rancher it is known and understood that he is familiar with ranches and all things thereon, including barns.

Questa was in ranch business all of his life. (Page 39, transcript.) Barn is defined on page 405, Words and Phrases, Vol. 1, Second series.)

> "A barn is defined as a covered building designed for the storage of grain, hay, flax or other farm produce."

In other words it is a necessary adjunct to a ranch. Why would he not be qualified to answer concerning

a barn as well as he would concerning the hay, vegetables, livestock and land values.

Jones on Evidence, 3 Edition, Experts on Agriculture.

He further stated that the picture was an exact reproduction of the other picture but an enlargement. (Page 37, transcript.) Mr. Questa testified that he was familiar with the value of barns. (Page 40, transcript.)

S. L. Williams testified that he did not inspect the barn, but he was in there and he went once or twice to get something and couldn't help but notice the construction because it was out of the ordinary. (Page 107, transcript.)

Questa testified:

Q. Now this drawing that I show you is that a reproduction of the barn?

A. Yes. (Page 41 of transcript.)

Upon the testimony of Questa that plans were reproductions which had been admitted in evidence as plaintiff's Ex. E., page 113 of transcript, and no objection was interposed. S. L. Williams offered evidence of the cost to construct the barn according to the plans and his knowledge of the barn after he had viewed it. S. L. Williams is a builder of long standing and is thoroughly familiar with costs of construction. There was no timely motion to strike Ex. B. and E. of plaintiff. It took Mr. Levit until the next day before he interposed an objection and that was on the ground S. L. Williams had no

proper foundation for attempting to arrive at his estimate. (Page 131, transcript.)

Inasmuch as Questa can testify concerning barns as a matter peculiarly within his knowledge as an expert,

Jones on Evidence, 3rd. Edition, Sec. 382, Experts on Agriculture, pages 575-6,

and having stated its value and that the picture and drawings were correct, S. L. Williams, with his years of experience as a builder, could testify to replacement value.

Jones on Evidence, Sec. 368, 3rd. Ed. page 554-555,

sets forth proof of qualifications of Experts:

> "In order to be competent as an expert must show himself to be skilled in the business or profession to which the subject relates, there is no precise rule as to the mode in which such skill or experience must be acquired. Thus the witness may have become qualified by actual experience, long observation without having made a study of the subject."
>
> *Bedell v. R. Co.,* 44 N.Y. 370;
>
> *Wigmore on Evidence,* Vol. 1, 2nd Ed. 1128-1139.

Withdrawing and Striking Out Evidence.

Jones on Evidence, 3rd Ed., 895.

> "It sometimes happens that answers are made which are not responsive to questions, unobjectionable in themselves, or that improper testimony is volunteered to which there is no opportunity to object in advance. In such cases the

proper remedy is to move promptly to strike out the objectionable testimony. It is a matter of right, on proper motion, to have testimony stricken out which is irresponsive and prejudicial; and the error of the Court in this respect is subject to review by the Appellate Court. If no such motion is made, the reception of such testimony is not error, and if the motion to strike out is not promptly made, the right is waived. The rule is the same as to improper testimony given in response to a question by the party injured thereby. But a party has no right to move to strike out testimony merely because it is unfavorable to him, and it is not sufficient in such cases to merely object to the evidence after it is received.

Additional Authorities:

Judgment Distinguished from Findings. *Freeman on Judgments,* Vol. 1, Sections 1-545.

Section 3. Judgment Distinguished from Findings and Opinion. . . .

"In the case of a Trial Court, a judgment must be distinguished from an opinion. The latter is the informal expression of the views of the Court and cannot prevail against its final order or decision. While the two may be combined in one instrument the opinion forms no parts of the judgment. So, as elsewhere shown, there is a distinction between the findings and conclusions of a Court, and its judgment. While they may constitute its decision and amount to the rendition of a judgment they are not the judgment itself. They amount to nothing more than an order for judgment, which must, of course, be distinguished from the judgment."

FAILURE TO ALLEGE VALUE

"Is cured by the admission of evidence as to its value without objection and by a verdict for plaintiff."

Waldron v. Home Mut. Ins. Co., 2 Wash. 534, 38 Pac. 136.

"And it is unnecessary to allege actual cash value of the property although the policy provides that the measure of recovery shall in no case be greater than its cash value at the time of the fire since such a provision only establishes a rule as to the proof necessary."

Hegard v. Calif. Ins. Co., 2 Cal. unrep. 663, 11 Pac. 594, 72 Cal. 535, 14 Pac. 180, 359.

MEETING OF MINDS.

Humphry v. Hartford Fire Ins. Co. v. Adler, 15 Blatchf (U.S.C.C.) 35 Fed. Cas. No. 6874, 12 Federal Cases Pg. 892, Case No. 6875;

Ellis v. Albany City Fire Ins. Co., 50 N. Y. 402, 407.

ORAL CONTRACTS—INSURANCE.

Joyce on Insurance, page 158, Sec. 32;

Taylor v. Merchants Fire Ins. Co., 9 How. (50 U. S.) 390.

AGREEMENTS TO INSURE MAY BE CONSIDERED IN EQUITY AS INSURANCE.

Humphry v. Hartford Ins. Co., Federal Case No. 6874;

Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co., 19 Howard (60 U.S.) 318, 15 Law. Ed. 636.

INSURANCE COMPANIES' AGENT'S AUTHORITY VERBAL CONTRACT OF INSURANCE.

Harron v. City of London Fire Ins. Co., 25 Pac. 982;

Sec. 8784, Supplement 1931-1941, *Nevada Compiled Laws.*

For the reasons and upon the grounds stated the Judgment appealed from should be affirmed.

Dated, Reno, Nevada,
May 14, 1943.

WILLIAM S. BOYLE,
Attorney for Appellees.